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No. 95-424

In The

Supreme Court of the United States

October Term, 1995

TURF LAWNMOWER REPAIR, INC., and JOHN L. GLORIA,

Petitioners,

vs.

BERGEN RECORD CORPORATION, BRUCE LOCKLIN, MARY ANNE DE MARCO, DAVID HALL and BYRON CAMPBELL,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of New Jersey

MOTION OF NEW JERSEY PRESS ASSOCIATION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN OPPOSITION TO PETITION AND BRIEF *AMICUS CURIAE*

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MOTION OF NEW JERSEY PRESS ASSOCIATION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN OPPOSITION TO PETITION

The New Jersey Press Association hereby moves, pursuant to Rule 37-2, for leave to file a brief *amicus curiae* in opposition to the petition for a writ of certiorari to the Supreme Court of New Jersey. The Petitioners, Turf Lawnmower Repair, Inc., and John L. Gloria, have declined to consent to the filing of this brief, Respondents, Bergen Record Corporation, Bruce Locklin, Mary Anne DeMarco, David Hall and Byron Campbell, have consented to the filing. A copy of the proposed *amicus* brief is attached.

The New Jersey Press Association is a non-profit organization incorporated in 1857 under the laws of the State of New Jersey. The NJPA membership includes 22 daily newspapers, 139 weekly newspapers, 2 college newspapers as well as corporate and individual members.

The New Jersey Superior Court, Appellate Division and the New Jersey Supreme Court granted the Press Association leave to appear as *amicus* in this matter in both those courts.

The New Jersey Supreme Court decision, based upon New Jersey common law, defines the ability of New Jersey newspapers to report upon matters affecting the public interest without fear of a judgment in a defamation action. As the major trade organization for New Jersey Newspapers, the New Jersey Press Association is uniquely positioned to address issues from the perspective of the newspaper publishing industry. It seeks to file the proposed brief and believes the brief could assist this Court.

It is respectfully requested that the Court grant leave to file the attached brief of the *amicus*, New Jersey Press Association.

Respectfully submitted,

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Dated: October 10, 1995

QUESTIONS PRESENTED

1. Was the decision of the New Jersey Supreme Court consonant with New Jersey common law and the principles of equal protection?

2. Was the imposition of the actual malice standard by the New Jersey Supreme Court in accordance with New Jersey common law?

LIST OF ALL PARTIES

The plaintiffs below were Petitioners Turf Lawnmower Repair, Inc. and John L. Gloria, individually (collectively "plaintiffs").

The defendants below included Respondents Bergen Record Corporation, Bruce Locklin, Mary Anne DeMarco, Byron Campbell, and David Hall (collectively "defendants").

Other defendants below also were Edward Mitchell, d/b/a Eddie's Power Equipment, Mark Winners, Robert Vroeginday, Douglas Livingston, John Doe and Richard Roe. The defendants were dismissed by plaintiffs at various points of the proceedings.

The New Jersey Press Association appeared as *amicus curiae* in the Superior Court of New Jersey Appellate Division and in the Supreme Court of New Jersey.

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BRIEF OF AMICUS CURIAE, NEW JERSEY PRESS ASSOCIATION IN OPPOSITION TO PETITION

TO THE HONORABLE SUPREME COURT:

The *amicus curiae,* New Jersey Press Association, respectfully requests that this Court deny the petition for writ of certiorari submitted by Petitioners, Turf Lawnmower Repair, Inc. and John L. Gloria.

OPINIONS BELOW

On March 15, 1995 the New Jersey Supreme Court affirmed the judgment of the Superior Court of New Jersey, Appellate Division, and the judgment of the trial court granting Respondents summary judgment. The decision of the New Jersey Supreme Court is reported at 139 N.J. 392, 655A.2d 417(1995).

Following issuance by the New Jersey Supreme Court of its opinion, Turf Lawnmower Repair, Inc. and John L. Gloria moved for a rehearing for reconsideration. The New Jersey Supreme Court denied that request in an unreported decision dated June 6, 1995.

STATEMENT OF JURISDICTION

The jurisdiction of this Court to review the March 15, 1995 judgment of the Supreme Court of New Jersey is invoked under 28 U.S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances.

The Fourteenth Amendment to the United States Constitution, Section 1, provides as follows:

> All persons born or naturalized in the United States, and subjects to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of its laws.

STATEMENT OF THE CASE

On August 21, 1988, the *Record* published an article entitled "A Clip Joint For Lawn Mowers." The article critically described the operations of Turf Lawnmower Repair, Inc., whose owner, Petitioner, John Gloria, was honored by the Small Business Administration in 1986 as New Jersey's Young Entrepreneur of the Year as a result of Turf's success. The article was the culmination of an investigation conducted by the author, Bruce Locklin, which consisted of interviews with John Gloria, former employees of Turf, customers of Turf, other shop owners, and performance tests conducted at various repair shops.

Petitioners filed suit on January 18, 1989, asserting defamation claims[1] based upon an August 21, 1988 article in the *Record*.

On March 31, 1992, *The Bergen Record* defendants moved for summary judgment. By order dated July 29, 1992, the Respondents' summary judgment motion was granted.

---

1. Tortious interference claims were dismissed by the trial court without appeal. RICO claims were withdrawn by Petitioners. Claims against various sources of *The Bergen Record* were voluntarily dismissed by Petitioners.

Petitioners filed a Notice of Appeal on September 11, 1992 and on January 3, 1994, the Appellate Division affirmed. In February of 1994, Petitioners petitioned the New Jersey Supreme Court for certification. In April 1994, the New Jersey Supreme Court granted certification.

In May of 1994, the New Jersey Press Association moved before the New Jersey Supreme Court for leave to appear as *amicus curiae,* which motion was granted July 15, 1994.

On March 15, 1995 the New Jersey Supreme Court affirmed the judgment of the Superior Court of New Jersey, Appellate Division. On June 6, 1995 the New Jersey Supreme Court denied Petitioners' application for reconsideration.

SUMMARY OF THE ARGUMENT

There exists no basis for this Court to grant the writ inasmuch as the New Jersey Supreme Court decided this case as a matter of New Jersey common law which decision offends no federal laws or rights.

REASONS FOR DENYING THE WRIT

I.

THE JUDGMENT OF THE NEW JERSEY SUPREME COURT WAS BASED ON NEW JERSEY COMMON LAW AND DOES NOT INFRINGE ON ANY FEDERAL LAWS OR FEDERAL RIGHTS.

After discussing the evolution of federal constitutional libel law (Pet. App. B, 13a-16a) and noting that ". . . , *Gertz* continued to allow each State to define its own appropriate standard of liability for a publisher or broadcaster of defamatory falsehoods

injurious to a private person. *Id.* at 347, 94 S. Ct. at 3010-3011, 41 L. Ed. 2d at 809." (Pet. App. B, 15a) the New Jersey Supreme Court addressed the appropriate standard of fault for private libel plaintiffs to recover against a media defendant in New Jersey when the subject matter of the speech is of public concern. The New Jersey Supreme Court had, previous to this case, recognized the tensions at issue in arriving at an appropriate standard of fault. "The evolution of the law of defamation reflects the tension between society's competing interest in encouraging the free flow of information about matters of public concern and in protecting an individual's reputation." *Dairy Stores, Inc. v. Sentinel Publishing Co.*, 104 N.J. 125, 135-36, 516 A.2d 220 (1986). The decision in *Turf Lawnmower Repair, Inc.* represents one more step along the path that the New Jersey Supreme Court commenced charting in *Dairy Stores, supra,* establishing the appropriate standard of fault that a private libel plaintiff must meet as a matter of New Jersey law.

In *Dairy Stores*, a local newspaper had written a series of articles regarding the sale of "spring water" by the plaintiff. The newspaper had taken the water to an independent state-certified testing laboratory which, after advising the reporter that the retailer of the water was a customer of the laboratory, tested the water and reported it did not contain chlorine. The reporter, skeptical of the results, thereafter took the bottle to another laboratory whose laboratory director, after conducting tests, opined that the "spring water" either was not from a spring or the spring was contaminated with chlorine. The reporter then took a second bottle to a third laboratory, whose report the reporter did not understand. After publication of the articles, *Dairy Stores* brought suit for defamation. Upon completion of discovery, the trial court dismissed the action on defendant's motion for summary judgment, imposing the actual malice standard of liability. In determining the standard of liability of a newspaper, its reporter and an independent laboratory retained by them for

statements that allegedly defamed the plaintiff corporation's reputation and disparaged its product, the New Jersey Supreme Court, pursuant to New Jersey common law, adopted an actual malice standard stating:

> Although constitutional considerations have dominated defamation law in recent years, the common law provides an alternative, and potentially more stable, framework for analyzing statements about matters of public interest.
>
> Another reason for turning to the common law is that the constitutional concepts do not comfortably fit the activities or products of a corporation. As the Law Division noted, the term "public figure" does not readily apply to corporate enterprises, and "public controversy" is poorly suited to describe the commercial activities of such an enterprise. 191 *N.J. Super.* at 212-213. The term "public figure" includes individuals who engage in a public controversy and ill fits a corporation, which ordinarily is interested not in thrusting itself into such a controversy, but in selling its product.

Dairy Stores, at 139.

The New Jersey court rejected the concept of a corporation as a public figure as an "awkward and uncertain method of determining whether statements about corporations or their products are actionable." *Dairy Stores, supra*, at 140. The court then found the common law qualified privilege of fair comment on matters of public concern applicable to that action.

> Because the present case involves a product that is unquestionably a matter of legitimate public concern, we believe it is more prudent to extend that standard for the time being only to such products, leaving to another day the determination whether the standard should apply to statements about all products no matter how prosaic or innocuous.

Dairy Stores, at 146.

In determining that the article constituted fair comment, the New Jersey Supreme Court imposed the actual malice standard.

> A qualified or conditional privilege has emerged as one of the prime means for the common law to balance the interests in reputation with the publication of information in the public interest.

Dairy Stores, at 137.

The New Jersey Supreme Court then provided a measure of guidance for determining what constituted matters of "legitimate public concern."

> We recognize that no everything that is newsworthy is a matter of legitimate public concern, and that sorting such matters from those of a more private nature may be difficult. In this regard, the assessment of public interest includes a determination whether the person "voluntarily and knowingly engaged in conduct that one in his position should reasonably know would

> implicate a legitimate public interest, engendering the real possibility of public attention and scrutiny." *Sisler v. Gannett Co., Inc.*, 104 N.J. 256, 274 (1986).

Dairy Stores, at 144.

Looking to decisions of other courts, the New Jersey Supreme Court provided a short list of examples of matters of public concern:

> . . . essentials of life as food and water . . . widespread effects of a product . . . substantial government regulation of business activities and products . . .

Dairy Stores, supra, at 144-145.

The New Jersey Supreme Court in *Dairy Stores, supra*, at 145 specifically left "to the future a more complete definition of matters of legitimate public concern." *See also Sisler v. Gannett Co.*, 104 N.J. 256, 516 A.2d 1083 (1986).

Sisler involved a retired banker who had loans from a bank of which he had been a founder and former president. A newspaper published a story asserting that the banker had received under-collateralized loans from the bank to finance his horse farm. After determining that the plaintiff was neither a public figure nor a limited public figure our Supreme Court found that an actual malice standard should nonetheless govern the case holding that ". . . when a private person with sufficient experience, understanding and knowledge enters into a personal transaction or conducts his personal affairs in a manner that one in his position would reasonably expect implicates a legitimate public interest with an attendant risk of publicity, defamatory

speech that focuses upon that public interest will not be actionable unless it has been published with actual malice." *Sisler, supra,* at 279, 516 A.2d 1083.

In *Turf*, the New Jersey Supreme Court stated:

> In *Dairy Stores* and *Sisler* we constructed a test to reflect public policy considerations often ignored in other States. (citations omitted) In those cases we sought to protect speech that affects the health and safety of the citizenry or involves a highly regulated industry.

Turf, supra (Pet. App. B, 23a).

Thus, the New Jersey Supreme Court in *Turf* further travelled the road left open to the states by this Court in *Gertz.*

In further explicating the New Jersey standard of liability for a private libel plaintiff, the New Jersey Supreme Court in *Turf* focused on the nature of the speech involved in determining whether a private libel plaintiff must meet a standard greater than negligence. In holding that where speech alleges consumer fraud that concerns a legitimate public interest a plaintiff must establish actual malice, the New Jersey Supreme Court stated:

> No hard and fast rules exist to determine whether alleged consumer fraud conduct reported in a newspaper article raises a matter of public concern sufficient to trigger the actual-malice standard. What constitutes consumer fraud depends not on the manner of investigation employed by the media to capture the story, but generally on whether

> the alleged activities of the business would constitute a cause of action under the "Consumer Fraud Act". Moreover, the article must deal primarily with consumer fraud viewed as a whole in light of all surrounding circumstances. If the court determines that substantially all the allegations set forth in the article, if true, would support a consumer fraud complaint, then the actual-malice standard will apply.

Turf, supra (Pet. App. B, 32a).

Petitioners urge this Court grant the writ, asserting that the decision of the New Jersey Supreme Court, which clearly and unequivocally was based upon New Jersey common law and the New Jersey State Constitution, ". . . impermissibly grants media defendants the right to control, in violation of plaintiffs' right to equal protection of the law, the application of the governing standard in a defamation action. By their editorial selectivity regarding the content of their article, defendants created a public controversy and then relied on the resulting public interest to assert the benefits of the state law privilege." (Pet. for Cert. at 4).

In support of this proposition Petitioners wrongfully assert that ". . . it remains a vital fact of constitutional law that once a state establishes such a standard, it must apply that standard in remedy equally to all individuals, mindful of their federally protected rights to maintenance of their good name and reputation, and of their rights to equal protection of law." (Pet. for Cert. at 9). The simple fact is that in *Gertz* this Court recognized that the protection of individual reputations is left primarily to the individual states when this Court stated, "the legitimate State interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory

falsehoods. We would not lightly require the State to abandon this purpose. . . ." *Gertz, supra*, at 341. *See also Paul v. Davis*, 424 U.S. 693 (1976).

Not only is the interest in compensating individuals for harm inflicted upon them by defamation primarily one of legitimate state interest, Petitioners also err when they assert that once a standard is established that standard must be applied equally to all individuals.

In support of its argument Petitioners cite *Lindsey v. Normet*, 405 U.S. 56 (1972). The import of *Lindsey, supra,* however, is its teaching that it is not mere classification that runs afoul of the equal protection clause but arbitrary or capricious classif ication. *Lindsey, supra,* at 77. New Jersey has chosen to establish a standard of fault in libel cases based upon the nature of the speech involved, holding that certain speech affecting public interest is entitled to a greater degree of protection than other types of speech. Indeed this Court has made the very same distinctions under the First Amendment. *See, e.g., New York Times Co. v. Sullivan*, 376 U.S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710, (1964) and its progeny.

In *Sisler, supra,* the New Jersey Supreme Court described the balancing of public policy considerations as a balancing test between the "warring interest of free speech and individual reputation." 104 N.J. at 265.

In *Turf*, giving due consideration to the interests of the public in speech which addresses matters involving consumer fraud, New Jersey struck the balance by requiring an actual malice standard. This striking of the balance can not be considered arbitrary or capricious and, as such, does not offend equal protection principles any more than common law absolute or qualified privileges in the law of defamation offend equal

protection principles. Such common law privileges founded, as they are, upon the recognition ". . . that on certain occasions the good that may be accomplished by permitting an individual to make a defamatory statement without fear of liability for misinformation outweighs the harm that may be done to the reputations of others", Robert D. Sack, *Libel, Slander, and Related Problems,* at 443-444, offend no equal protection principles.

II.

THE USE OF THE PHRASE "ACTUAL MALICE" BY THE NEW JERSEY SUPREME COURT, EVEN IF INCONSISTENT WITH THIS COURT'S DEFINITION OF THAT TERM, OFFENDS NO FEDERAL LAWS OR RIGHTS.

Petitioners engage in an analysis of the record to support its assertion that the New Jersey Supreme Court's conclusion that the reporter's "methods may have been negligent or even grossly negligent", *Turf*, Pet. App. B, 43a, but that Plaintiffs have failed to prove that Locklin ever doubted that Turf's conduct constituted serious consumer fraud practices and therefore failed to demonstrate actual malice is "in direct conflict with prior opinions of this court." (Pet. for Cert. at 21).

The simple answer to this assertion is that the standard of fault by which New Jersey measures actual malice is a state common law standard of fault. While the New Jersey Supreme Court resorted to opinions of this Court and other courts defining the concept of actual malice to inform its use of that term in New Jersey common law, those decisions do only that in New Jersey common law — provide an analytical background to draw upon in developing a meaning for the term actual malice. Indeed, in *Dairy Stores, supra*, the New Jersey Supreme Court commented

on the meaning of the term actual malice in New Jersey common law stating:

> The term "malice" caused enough confusion when it was confined to the common law, but now that it has assumed a constitutional dimension, the confusion is compounded. Understandably, the differing definitions of "malice" have confounded trial courts. *See, e.g., Burke v. Deiner, supra,* 97 N.J. at 479 (trial court erred by including both definitions of malice in jury instructions); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., supra,* 472 U.S. at 754, 105 *S.Ct.* at 2943 n. 3, 86 *L.Ed.*2d at 597 n. 3 (quoting from the trial court's charge that confused the two definitions of malice).
>
> "Malice" adds nothing to the legal analysis of an allegedly defamatory statement, and it can become a pitfall in the underbrush of the common law. Consequently, we lose nothing by striking "malice" from the vocabulary of the common law of defamation. Prosser & Keeton, *supra,* § 115 at 834. Indeed, the Restatement eschews the term altogether, speaking instead of the "abuse of privilege." *Restatement (Second), supra,* § 599. It is more direct to recognize the legal consequences of the publication of certain statements without recourse to so ambiguous a word with a checkered past. For example, we need not resort to the term "malice" to state that no one has a license to lie. Although we discard the label, we adhere to the

> principle that to overcome a qualified or conditional privilege, a plaintiff must establish that the publisher knew the statement to be false or acted in reckless disregard of its truth or falsity. *Restatement (Second), supra,* § 600. With or without the term, the critical determination is whether, on balance, the public interest in obtaining information outweighs the individual's right to protect his or her reputation. *Coleman v. Newark Morning Ledger Co., supra,* 29 N.J. at 376.

Consequently, because the New Jersey Supreme Court in *Turf* applied its own state fault standard, its application of that standard to the facts of this case does not result in a conflict as asserted by Petitionerswith prior decisions of this Court defining actual malice thereby warranting the exercise of this Court's supervisory authority.

III.

THE NEW JERSEY SUPREME COURT PROPERLY DECIDED BOTH JOHN GLORIA AND HIS CLOSELY HELD CORPORATION WERE REQUIRED TO PROVE ACTUAL MALICE.

Petitioners assert that the New Jersey Supreme Court's failure to distinguish Mr. Gloria from the corporate entity violated Mr. Gloria's right to the equal protection of New Jersey defamation law. Once again this assertion is unfounded. Simply stated, the facts in this case amply support the fact that in this close corporation that the corporation was the alter ego for Mr. Gloria. He was its spokesperson. Consequently, there was a sufficient basis in the record to support the Supreme Court's treatment of both Gloria and the corporation in the same manner.

CONCLUSION

Based upon the foregoing, *amicus curiae*, New Jersey Press Association, respectfully submits that the decision of the New Jersey Supreme Court was not in conflict with any other decision, and that there exists no important question of federal law which has not been, but should be, settled by this Court. *Amicus curiae* respectfully requests this Court deny the petition for certiorari.

Respectfully submitted,

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